IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JOHN NEFF,

Plaintiff,

v.

ELDON K. McDANIEL, *et al.*,

Defendants.

3:09-cv-00271-HDM-VPC

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

August 27, 2010

This Report and Recommendation is made to the Honorable Howard D. McKibben, Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. John Neff ("plaintiff"), an inmate at Ely State Prison ("ESP"), is proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983 (#37). Defendants removed this action to federal court on May 26, 2009 (#1). The court screened plaintiff's complaint (#11) and filed it on July 6, 2009 (#12). Defendants filed a motion to dismiss (#13). On February 22, 2010, the District Court issued an order dismissing some of plaintiff's claims with leave to file an amended complaint (#33). Before the court is plaintiff's first amended complaint (#37).

I. Screening Standard

The court must screen plaintiff's complaint pursuant to 28 U.S.C. § 1915A. Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988). *Pro se* pleadings, however,

must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th Cir. 1988). Allegations of a *pro se* complainant are held to less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under § 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. Of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the Court takes as true all allegations of material fact stated in the complaint, and the Court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). While the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 1955. A formulaic recitation of the elements of a cause of action is insufficient. *Id.*; *see Papasan v. Allain*, 478 U.S. 265, 286 (1986).

All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319,

327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d. 1103, 1106 (9th Cir. 1995).

II. The Instant Complaint

This court has screened plaintiff's first amended civil rights complaint pursuant to 28 U.S.C. § 1915A. Plaintiff brings this action against the following individuals: Arthur Neagle, Lieutenant at ESP; Ronald Bryant, Sergeant at ESP; Eldon K. McDaniel, Warden of ESP; M. Oxborough, a caseworker at ESP; Adam Endel, Associate Warden of Prisons at ESP; and Debra Brooks, Associate Warden of Operations at ESP. Plaintiff seeks declaratory, injunctive, and monetary relief.

A. Allegations in Count I

In count I, plaintiff claims that defendant Neagle retaliated against him for the exercise of his religious beliefs (#37, p. 11). Plaintiff's religion, Asatru or Odinism, apparently prohibits close contact with illness. *Id.* at pp. 4-5. Based on his religious beliefs, plaintiff refused to return to his cell because his cellmate allegedly had Hepatitis C. *Id.* Prison officials charged plaintiff with "disobeying a direct order" and " disruptive demonstration or practice." *Id.* at 5. At his disciplinary hearing, plaintiff informed defendant Neagle that "as a religious tenet of Odinism, [plaintiff was] not allowed to have close contact with people who have illness or disease." *Id.* Nonetheless, defendant Neagle found plaintiff guilty of the violating prison rules and placed plaintiff in disciplinary segregation for fifteen days. *Id* at 5.

Also in count I, plaintiff claims that defendant Bryant seized his personal and legal property in retaliation for the exercise of his religious beliefs. *Id* at 11. Plaintiff notes that defendant Bryant "took plaintiff's address book claiming it contained the names and numbers of [gang] members." *Id.* at 8. Plaintiff disagrees and asserts that the information in the address book was for use in a legal proceeding. In addition to this claim against defendant Bryant, plaintiff further claims defendant McDaniel violated his constitutional rights by "upholding [defendant] Bryant's actions in reference

to the address book." *Id* at 11.

Also in count I, plaintiff claims that defendant McDaniel has violated his First Amendment rights because he has not allowed law clerks to come to the housing units, and he has implemented a paging system.

B. Allegations in Count II

In count II, plaintiff next claims that defendant McDaniel violated his Fourteenth Amendment due process rights when he "enacted a [prison] rule without enabling legislation known as 'I.P. 5.13 (Now Operational Procedure - 'OP' - 5.13.)," which imposed sanctions "not authorized by the state code of penal discipline." *Id* at 5. Specifically, plaintiff claims that the procedure imposes sanctions that exceed and are contrary to state law (Nevada Revised Statutes section 209.246) and corresponding state regulations (Administrative Regulation 707). *Id.*

Also in count II, plaintiff claims that defendants Oxborough, Brooks, Endel, and McDaniel violated his due process rights when they kept him in administrative segregation for a total of 167 days without any hearing. *Id* at 10.

In count II, plaintiff further claims that defendant Bryant moved him to a new cell in administrative segregation and confiscated the entirety of plaintiff's property; leaving him with no clothing, soap, shampoo, or hygiene items for two days. *Id.* at pp. 8, 11, 12.

III. Screening

A. Count I: First Amendment Claims

1. Retaliation

a. Defendant Neagle

Plaintiff maintains that defendant Neagle gave him fifteen days in disciplinary segregation in retaliation for exercising his religious beliefs. Specifically, plaintiff contends that his religious beliefs prohibit close contact with illness.

"Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) [a]n assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his

First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559 (9th Cir. 2005) (citations omitted); *see also Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997).

Here, accepting all plaintiff's alleged facts as true, plaintiff alleges that defendant Neagle (1) punished him with disciplinary segregation (2) because of (3) plaintiff's religious beliefs, (4) which chilled his religious exercise and (5) did not reasonably advance a legitimate correctional goal. Therefore, the court finds that he states a colorable retaliation claim.

b. Defendant Bryant

Plaintiff contends that defendant Bryant took plaintiff's address book in retaliation for his legal activities and religious beliefs. As stated above, there are five essential elements to maintain a claim for retaliation.

Here, plaintiff states a claim that defendant Bryant (1) confiscated plaintiff's property (2) because of (3) plaintiff's constitutionally protected activity in pursuit of a lawsuit and his Odinist religion, (4) which chilled the exercise of his constitutional rights, and (5) did not reasonable advance a legitimate correctional goal. Therefore, he states a colorable retaliation claim against defendant Bryant.

In addition to plaintiff's claim against defendant Bryant with respect to the address book, plaintiff also appears to state that defendant Bryant took all of his personal property in retaliation for his religious beliefs. Plaintiff styles this as a due process claim; however, the court finds that it more properly states a claim for retaliation.

In sum, plaintiff states a claim for retaliation against defendant Bryant (1) for seizure of the address book and (2) seizure of other property while in administrative segregation.

c. Defendant McDaniel

Plaintiff alleges that defendant McDaniel is liable for "upholding" defendant Bryant's actions regarding the address book.

In a section 1983 claim, "a supervisor is liable for the acts of his subordinates [1]'if the supervisor participated in or directed the violations, or [2] knew of the violations of subordinates and

failed to act to prevent them.'" *Corales v. Bennet*, 567 F.3d 554, 570 (9th Cir. 2009) (citations omitted). "The requisite causal connection may be established when an official sets in motion a 'series of acts by others which the actor knows or reasonably should know would cause others to inflict' constitutional harms." *Id.*

Here, plaintiff contends that defendant McDaniel upheld defendant Bryant's actions. While it is clear that plaintiff has not specifically alleged the participation of defendant McDaniel in the search and seizure of the property, on the court's liberal reading of the complaint, he has sufficiently alleged that defendant McDaniel was aware of Bryant's actions and did nothing to prevent them. This would suggest that he knew of Bryant's retaliatory actions and failed to prevent them. Therefore, the court finds that plaintiff has stated a colorable claim against defendant McDaniel for retaliation.

2. Access To Courts

In count I, plaintiff alleges a continuing violation of his constitutional rights because defendant McDaniel (1) prevents law clerks from visiting the housing units, and (2) has implemented a "paging system" that plaintiff alleges is unconstitutional.

"The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or assistance from persons trained in the law." *Lewis v. Casey*, 518 U.S. 343, 346 (1996). A prisoner claiming inadequate access to the courts must establish that he or she suffered actual injury. *See Lewis* 518 U.S. at 351. The inmate must allege that the shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. *Id.* For example, "[h]e might show . . .that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known." *Id.*

Here, plaintiff merely voices a generalized grievance concerning the state of his access to legal materials. Plaintiff's assertion that defendant McDaniel does not allow law clerks to visit the housing units does not provide sufficient factual content to enable the claim to proceed. In addition,

the court need not accept as true plaintiff's legal conclusion that the paging system is unconstitutional. Most importantly, plaintiff has not pled any facts to show that he has suffered "actual injury." Accordingly, the court will dismiss this claim without prejudice for failure to state a claim upon which relief can be granted.

C. Count II: Fourteenth Amendment Due Process

1. Defendant McDaniel

Plaintiff contends that defendant McDaniel violated his due process rights under the Fourteenth Amendment when he enacted an operating procedure, which resulted in plaintiff's loss of certain privileges.

In order to state a cause of action for deprivation of due process rights, a plaintiff must first establish the existence of a liberty interest for which the protection is sought. Liberty interests arise from the Due Process Clause itself or from State law. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). With respect to state-created liberty interests, until *Sandin v. Conner*,515 U.S. 472 (1995), inmate litigants argued that the mandatory language in prison regulations created liberty interests. The *Sandin* Court abandoned this approach, and instead, courts were to focus on the nature of the deprivation to determine the existence of a liberty interest. *Id.* State created liberty interests continue to exist, but they are limited to freedom from restraint which "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. Under *Sandin*, a factual comparison must be made, "examining the hardship caused by the prisoner's challenged action in relation to the basic conditions of life as a prisoner." *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003). "Specifically, we look to three guideposts by which to frame the inquiry: (1) whether the challenged condition mirrored those conditions imposed upon inmates in administrative segregation and protective custody, and thus comported with the prison's discretionary authority; (2) the duration of the condition, and the degree of restraint imposed; and (3) whether the state's action will invariably affect the duration of the prisoner's sentence." *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003) (quoting *Sandin*, 515 U.S. at 486-87).

Here, plaintiff alleges that he has a liberty interest in remaining free from the restrictions

placed upon him via the operating procedure. Specifically, plaintiff asserts that he has been illegitimately denied personal phone calls, electrical appliances, and canteen privileges for six months; all visitations for the period of one year; and participation in the "package program." It is settled law that the loss of personal phone calls, electrical appliances, canteen privileges, and participation in the package program does not constitute a liberty interest. *See Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996); *Coakley v. Murphy*, 884 F.2d 1218, 1221 (9th Cir. 1989) (no constitutional right to rehabilitation). Although plaintiff claims that he has a liberty interest in all visitation, the court disagrees. Analyzing the imposition of a loss of visitation in light of the factors in *Serrano*, the court finds, with one exception, that it does not constitute a constitutionally protected interest. The condition mirrors that of other inmates in administrative segregation, and as plaintiff describes, the prison has the authority under its administrative regulations to restrict visitation. Plaintiff's loss of visitation is limited to the period of one year, and he does not state that the loss of visitation in any way will affect the length of his sentence. Therefore, the court finds that the sanctions imposed by defendant does not deny plaintiff of a constitutionally protected liberty interest.

However, the court notes that plaintiff has a right to contact visitation with an attorney. *See Keenan*, 83 F.3d at 1092. Although the court liberally construes *pro se* pleadings, it cannot read facts into a pleading itself. That said, the court recognizes that plaintiff may have been denied such an attorney visit; therefore, the court dismisses the claim without prejudice.

2. Defendants Oxborough, Brooks, Endel, and McDaniel

Plaintiff claims defendants Oxborough, Brooks, Endel, and McDaniel violated his Fourteenth Amendment rights when they failed to follow the policies and regulations regarding periodic hearings. Specifically, plaintiff claims that the 167 days he spent in administrative segregation constitutes an "atypical and significant hardship."

The Constitution provides no liberty interest to be free from administrative segregation. *Hewitt v. Helms*, 459 U.S. 460, 166-68 (1983); *Smith v. Noonan*, 992 F.2d 987, 989 (9th Cir. 1993). However, when a prisoner is placed in administrative segregation, due process requires prison officials to: (1) conduct an informal nonadversary review of the evidence justifying the decision to

segregate the prisoner within a reasonable time of placing the prisoner in administrative segregation; (2) provide the prisoner with some notice of the charges before the review; and (3) give the prisoner an opportunity to respond to the charges. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986), *abrogated in part on other grounds by Sandin*, 515 U.S. 472. The prisoner is not entitled to a "detailed written notice of charges, representation by counsel or counsel-substitute, an opportunity to present witnesses, or a written decision describing the reasons for placing the prisoner in administrative segregation." *Id.* at 1100-01. If a prisoner is to be retained in administrative segregation, officials must periodically review the initial placement. *Id.* at 1101.

Here, plaintiff alleges that defendants failed to administer a classification review with the time period prescribed in prison regulations. The court does not comment on whether the regulation itself creates a constitutionally protected liberty interest. However, plaintiff appears to state that defendants failed to review his continued housing in administrative segregation for a period of at least 167 days. To the extent that *Toussaint* holds inmates have a due process right in periodic review of their continued housing in administrative segregation, plaintiff has stated a colorable due process claim.

3. Defendant Bryant

Plaintiff contends that defendant Bryant violated his Fourteenth Amendment rights when he took his property in retaliation over plaintiff's religious tenets (#37, p. 12). Presumably, plaintiff brings this claim under due process because he finds that a prison official's failure to follow prison regulations amounts to a deprivation of due process under the Fourteenth Amendment. The court disagrees, but it finds that the facts alleged constitute claims under the First and Eighth Amendments.[1]

As discussed above, *Sandin* has limited state created liberty interests to those that constitute an atypical and significant hardship. Indeed, defendant Bryant's alleged failure to supply plaintiff

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[1] The court acknowledges that in the case of a *pro se* litigant, such as this, it must take a broader view as to the specific legal theories and look to whether the facts state a claim. *See Fontana v. Haskins*, 262 F.3d 871, 877 (9th Cir. 2001) ("Specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief.").

with basic necessities constitutes such hardship. However, the court does not address this claim under the Fourteenth Amendment, rather it finds it proper to address it under the Eighth Amendment. *See e.g. Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) ("Where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing a plaintiff's claims."). The court finds that plaintiff's factual averments more properly state a colorable claim for retaliation under the First Amendment as well as a conditions of confinement claim under the Eighth Amendment. The court previously addressed the retaliation claim, *see* Part III.A.1.b, and the court addresses under the Eight Amendment below.

B. Eighth Amendment Conditions of Confinement Claim

1. Defendant Bryant

Plaintiff contends that defendant Bryant left him without basic necessities when he took all of plaintiff's property to his office for two days.

The conditions under which a prisoner is confined are subject to scrutiny under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 31 (1993). The Eighth Amendment prohibits the imposition of cruel and unusual punishments and "embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). To assert an Eighth Amendment claim for deprivation of humane conditions of confinement, a prisoner must satisfy two requirements: one objective and one subjective. *Farmer v Brennan*, 511 U.S. 825, 834 (1994); *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1994).

Under the objective requirement, the plaintiff must allege facts sufficient to show that "a prison official's acts or omissions . . . result[ed] in the denial of the 'minimal civilized measure of life's necessities.'" *Farmer*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). Although prison conditions may be harsh, prison officials must provide prisoners with food, clothing, shelter, sanitation, and medical care. *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). "The circumstances, nature and duration of a deprivation of necessities must be considered in determining whether a constitutional violation has occurred." *Johnson v. Lewis*, 217 F.3d 726, 731

(9th Cir. 2000). "The more basic the need, the shorter time it can be withheld." *Id.* (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1259 (9th Cir. 1982)).

The subjective requirement, relating to the defendant's state of mind, requires that the plaintiff allege facts sufficient to show "deliberate indifference." *Allen*, 48 F.3d at 1087. "Deliberate indifference" exists when a prison official "knows of and disregards an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

Further, "[i]nmates have the right to personal hygiene supplies such as toothbrushes and soap." *Keenan*, 83 F.3d at 1091, *amended by* 135 F.3d 1318 (9th Cir. 1998). Also, "[t]he denial of adequate clothing can inflict pain under the Eighth Amendment." *Walker v. Sumner*, 14 F.3d 1415, 1421 (9th Cir. 1994), *abrogated in part on other grounds by Sandin*, 515 U.S. at 472.

Here, plaintiff claims that defendant Bryant left him with "no clothing for warmth, no hygiene items, no soap, no shampoo, and no legal records" (#37, p. 12). Plaintiff pleads facts that suggest that defendant Bryant took his property with knowing disregard to plaintiff's health and safety. Liberally construing the complaint, plaintiff has stated a colorable Eighth Amendment condition of confinement claim.

III. Recommendation

IT IS THEREFORE RECOMMENDED that the clerk be directed to **FILE** the complaint.

IT IS FURTHER RECOMMENDED that plaintiff's retaliation claim in count I against defendants Neagle, Bryant, and McDaniel be allowed to **PROCEED**.

IT IS FURTHER RECOMMENDED that plaintiff's due process claim in count II against defendants Brooks, Endel, and McDaniel be allowed to **PROCEED**.

IT IS FURTHER RECOMMENDED that plaintiff's claim in count II against defendant Bryant with respect to plaintiff's conditions of confinement be allowed to **PROCEED**.

IT IS FURTHER RECOMMENDED that plaintiff's claim within Count I that defendant McDaniel violated his First Amendment right to access the courts be **DISMISSED** without

prejudice.

IT IS FURTHER RECOMMENDED that plaintiff's claim within Count II that defendant McDaniel violated his due process rights be **DISMISSED** without prejudice.

IT IS FURTHER RECOMMENDED that plaintiff's claims in Count II that defendant Bryant violated his due process right in seizure of his property be **DISMISSED** without prejudice.

IT IS FURTHER RECOMMENDED that the clerk be ordered to **electronically serve a copy of this Order, along with a copy of Plaintiff's First Amended Complaint, on the Office of the Attorney General of the State of Nevada, attention Pamela Sharp.** The Attorney General shall file and serve an answer or other response to the First Amended Complaint within **thirty (30) days** of the date of entry of this Order.

IT IS FURTHER RECOMMENDED that if the Attorney General does not accept service of process for any named defendant(s), then plaintiff must file a motion identifying the unserved defendant(s), requesting issuance of summons for the unserved defendant(s), and specifying the full name(s) and address(es) of the unserved defendant(s).

IT IS FURTHER RECOMMENDED that plaintiff's motion for summons on additional defendants (#38) be **DENIED** without prejudice as moot with leave to renew the motion should the Office of the Attorney General of the State of Nevada not accept service.

DATED: August 27, 2010.

UNITED STATES MAGISTRATE JUDGE